INDEX

PAGE

Argument: The Arguments Put Forth by the Respondent in His Brief in Opposition Demonstrate Even More Clearly Why This Case Presents Substantial and Important Questions Calling for the Grant of Certiorari by This Court 1–11

Conclusion 11

AUTHORITIES CITED

Cases:

	PAGE
Baldwin v. New York, 399 U. S. 66 (1970)	3
Bloom v. Illinois, 391 U. S. 194 (1968)	5
Brown v. United States, 356 U. S. 148 (1958)	10
Cooke v. United States, 267 U. S. 517 (1925)	4–5
Duncan v. Louisiana, 391 U. S. 145 (1968)	4
Frank v. United States, 395 U. S. 147 (1969)	3
Groppi v. Leslie, 404 U. S. 496 (1972)	5
Holt v. Virginia, 381 U. S. 131 (1965)	9
Johnson v. Mississippi, 403 U. S. 212 (1971)	9
In re Little, 404 U. S. 553 (1972)	10
In re McConnell, 370 U. S. 230 (1962)	10
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	9
Offutt v. United States, 348 U. S. 11 (1954)	9
United States v. Marshall, ___ S. 2d ___, 9th Cir., Sept. 7, 1973, 14 Crim. L. Rep. 2032 (1973).	9

Constitutional Provisions:

U. S. Const. Amend. VI	4, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - - *Respondent*

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

The Arguments Put Forth by the Respondent in His Brief in Opposition Demonstrate Even More Clearly Why This Case Presents Substantial and Important Questions Calling for the Grant of Certiorari by This Court.

The arguments put forth by the respondent in his Brief in Opposition (which he has incorrectly styled a "Response") show most clearly the dangers to the rights of both Attorneys and their clients that can result from entrusting Trial Judges with an unlimited power to impose summary punishment for purported contempts committed in their presence.

Before dealing with these particular arguments directly, we do, however, feel constrained to call the

attention of this Court to our disagreement with the conclusionary and misstated Statement of the Case that appears in Respondent's Brief in Opposition. In statement after statement occurring therein, respondent argues propositions that are simply not supported in the record of this case, below. Specifically, as to whether the various contempts here claimed against petitioner were clearly and specifically stated to Petitioner at the time of their occurrence, and whether a right of allocation was had as to same in the several instances charged against petitioner, an examination of the Transcript of Evidence from the trial of this case will show that the contentions of respondent in his Brief in Opposition in these two regards are simply not supported by the actual record. However, it is petitioner's position that a more appropriate time to deal with such substantive questions in this case will be at a later stage in these entire proceedings, to-wit upon a full review of this case, should Certiorari as here sought be granted.

Back on point, the Brief of respondent argues, in the main, as follows:

1. That respondent has the power to modify sentences retroactively in order to defeat the alleged contemnor's right to trial by jury;
2. That there is no right whatsoever on the part of an alleged contemnor to be heard in defense or mitigation when a Trial Judge proceeds summarily against him;

3. That in no way could the respondent herein be said to have been lacking in impartiality in dealing with the petitioner herein;

4. That conduct perceived by respondent as being "smart aleck" or disrespectful can be punished as criminal contempt, without regard to whether it has created a material obstruction to the administration of justice.

Respondent has joined issue on all of the issues presented in the Petition for Certiorari, and the nature of respondent's arguments demonstrates, particularly, the importance of the resolution of these issues to the administration of justice in this country.

The Respondent first argues that so long as the actual sentence imposed for contempt does not exceed six months, there is no right to a trial by jury, citing *Frank* v. *United States,* 395 U. S. 147 (1969). As the petitioner has argued (Pet., p. 13), the Kentucky Court of Appeals has read this Court's decisions in *Frank* and in *Baldwin* v. *New York,* 399 U. S. 66 (1970), as setting forth a "six month rule," and holding that whenever the sentence actually imposed is less than six months, there is no right to a jury trial, *regardless of other "objective criteria reflecting the seriousness of the offense,"* and the respondent agrees with this interpretation of what the Kentucky Court of Appeals has done. The petitioner, however, would submit that this Court has not held that the severity of the penalty is the *only* indication of the seriousness of the offense, and that where, as here, there are other

"objective criteria," such as the 54 month sentence originally imposed, showing that indeed a "serious offense" was allegedly committed, the Sixth Amendment's guarantee of the right to trial by jury applies, irrespective of the penalty that was actually imposed. *C.f. Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Nor has it held that where the sentence imposed originally exceeded six months, that sentence can be modified retroactively by the trial judge or the reviewing court to bring it within a purported "six month rule"[1] and thereby defeat the alleged contemnor's right to a jury trial. Both of these questions are substantial, and should be resolved by this Court.

The respondent next contends that there is no right whatsoever to be heard in defense or mitigation when the trial judge proceeds summarily to punish for contempt. In support of this contention he has cited out-of-context language in *Cooke* v. *United States,* 267

[1]The respondent states: "After the judgments of contempts were entered and before the Court of Appeals of Kentucky affirmed these judgments, Judge Hayes modified his order and eliminated the request that the sentence be served consecutively and reduced the maximum sentence to that of one to six months" (Brief in Opposition, p. 7). To say the least, this statement is misleading. What the respondent did was to move the Court of Appeals to correct the judgment, and when this motion was granted, he filed a corrected judgment in which he reduced the sentences of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts. He did not specifically state that the sentences were to run consecutively, but he did not say that they were to run concurrently either (App., pp. 56a-57a of Pet.). It may also be asked why, if the respondent intended to limit the total punishment imposed to a maximum of six months' imprisonment, he argued in his brief before the Court of Appeals that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee, pp. 2, 17).

U. S. 517, 537 (1925), quoted in *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968), to the effect that, "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." Neither *Cooke* nor *Bloom,* of course, involved an alleged contempt committed in open court. But it is precisely because the respondent can argue in this vein, and have such an argument upheld by the highest court of a state, that it is necessary for this Court to determine whether the right of allocution, which it has found to be "normally given" in the case of summary contempt proceedings, *Groppi* v. *Leslie,* 404 U. S. 496, 504 (1972), is required by due process of law.

The amicus curiae brief filed by the Louisville Bar Association argues cogently that the due process clause should be interpreted as prohobiting the trial judge from proceeding summarily to punish for contempt at all, notwithstanding that the alleged contempt was committed in his presence (Brief of Amicus Curiae, pp. 12-17). The petitioner fully endorses this view, but is also contending that due process requires that, at a minimum, an alleged contemnor be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. This Court should grant certiorari to determine the applicability of the guarantees of procedural due process to summary contempt proceedings, and as

indicated by the case at bar, this question has not yet been fully resolved.[2]

With respect to the petitioner's contention that the respondent could not impartially sit in judgment on the multiple contempt charges, the respondent replies that, "There were no insults, vilifications, shouting matches or anything else that would cause any reasonable person to conclude that Judge Hayes was 'personally embroiled' with the petititoner to the extent that he could not objectively deal with the contempts at the conclusion of the trial" (Brief in Opposition, p. 11). This statement of the respondent simply is not true, and the record in this case proves it to be untrue. The fact is that there was a veritable flood of insult and villification flowing from this Trial

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[2]The respondent also argues that although the petitioner had no "right" to respond, he was permitted to do so, presumably as a matter of "grace." The record is unmistakably clear, however, that the petitioner had no meaningful opportunity to respond to any of the charges. The respondent never specified what the charges were, nor did he impose any punishment at the time he held the petitioner in contempt. On counts 2 through 5 he did permit some discussion about the allegedly contemptuous conduct, but as the pages of the record cited by the respondent indicate, it was intertwined with a discussion of the substantive issues. The respondent did not say one way or another whether the contempt finding "stood" following the discussion, and, of course, he did not impose punishment. On counts 6 and 9 the respondent simply informed the petitioner from the bench that he was in contempt. He allowed the petitioner to make a response for the record on count 7, but then directed the court reporter not to put it in the record (Tr. 2032), and specifically refused to permit the petitioner to make a response for the record on count 8. The behavior of the respondent in this regard clearly demonstrates that he viewed the opportunity to be heard as a matter of "grace," and the Kentucky Court of Appeals in effect endorsed this view. If there is a right to be heard in defense or mitigation when the trial judge proceeds summarily to punish for contempt, that right was not afforded to the petitioner in the case at bar.

Judge and directed at petitioner throughout this entire trial, which pattern the Kentucky Court of Appeals characterized as "inappropriate" in that portion of its Opinion in which it attempted to skip over the vicious and arbitrary performance of this Trial Judge in his conduct of this trial; (in this same Opinion, petitioner was referred to as have been "courteous" throughout the entire trial, but, at the same time, somehow guilty of the most grievous affronts to the respondent).

The respondent's tirade from the bench at the conclusion of the trial, and his direction to his bailiffs to "take him (the petitioner) away", are viewed simply by the Kentucky Court of Appeals as a "declaration of the charges" (*Ibid.*). It is amazing to note what the respondent ignores! First, he ignores his *own* remarks to and about the petitioner throughout the trial, such as "I think you're putting on a show" (Tr. 348), "I may as well sit on him (the petitioner) right now" (Tr. 546), "Before it's over you might have a lot more than that (five months of petitioner's life) wrapped up in this case" (Tr. 1957), "There is no evidence even that this is a political case. That's what you guys (petitioner) try to make every case that comes into Court" (Tr. 1909), and on and on.

If the foregoing instances of respondent's remarks at this trial are not "insults and vilifications", evidencing hostility on the part of the respondent towards the petitioner, it might well be asked what would be. Respondent's Brief also ignores other actions of respondent, such as demanding that the peti-

tioner produce a list of all of the defense witnesses within fifteen minutes and then summarily deciding that many of them would not be permitted to testify, his issuance of an invalid order prohibiting the petitioner from the further practice of law in "his" court, and his refusing to admit the petititoner to bail or to even hold a bail hearing until he was ordered to do so by the Court of Appeals. He admits that he "castigated" the petitioner when imposing sentence from the bench, but says that this is not "unusual." While it may not be unusual in Louisville, Kentucky for this particular judge to "castigate" defendants (and threaten to gag them if they attempt to speak a word in their own defense), the sorrowful but inescapable truth is that respondent's words at the time he "castigated" the petitioner were clearly those of a man out of control of himself, and a jural officer completely in the grasp of passion and intemperateness, and demonstrate the unbelievable hostility and bias that he bore toward petitioner. Respondent also ignores the adversary posture that the Court of Appeals found existed between him and the petitioner, with him "on the defensive." 494 S. W. 2d at 742. He likewise ignores the fact that it was necessary for the petitioner to accuse him of denying his client's right to a public trial (Tr. 1895), and of acting on the basis in rancor in ruling that race was not an issue in the case (Tr. 1968), and finally that the petitioner unsuccessfully sought a delay in the case so that he could seek a writ of mandamus from the Court of Appeals to prevent

the respondent from proceeding further in the case (Tr. 1957).[3]

The holding of the Kentucky Court of Appeals to the effect that the respondent could impartially sit in judgment on the multiple contempt charges against the petitioner is so clearly inconsistent with the applicable decisions of this Court on the question of judicial disqualification, *e.g.*, *Offutt* v. *United States*, 348 U. S. 11 (1954), *Holt* v. *Virginia*, 381 U. S. 131 (1965), *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), *Johnson* v. *Mississippi*, 403 U. S. 455 (1971), as to call for the grant of certiorari, and the reversal of that holding.

The petitioner has asked this Court to grant certiorari to determine the substantial question of what conduct on the part of an attorney engaged in the zealous representation of his client can be made punishable as criminal contempt, and has contended that the resolution of this question is necessary to fully implement the Sixth Amendment's guarantee of the effective assistance of Counsel.[4] In regard to this point, the reply of the respondent is merely that the petitioner was "guilty of each and every contempt for

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[3]See, also, the recent case of *United States* v. *Marshall*, ____ S. 2d ____, 9th Cir., Sept. 7, 1973, 14 *Crim. L. Rep.* 2032, where improper conduct toward a lawyer on the part of the trial judge required that all further proceedings in the case be transferred to another judge.

[4]In this connection, it is appalling how little concern or regard for the right of the Defendant who was the subject of this trial, below, to receive a just and fair trial, is ever expressed by either the respondent herein, or those acting in his behalf. Nor does there appear any recognition of the simple fact that the abuse and throttling of his lawyer by a biased and intemperate Trial Judge totally destroys all possibility that a Defendant on trial can receive an adequate defense, and a fair and legal trial.

which he was cited", but, interestingly, respondent does not deal at all with the controlling and substantive question of whether the conduct for which petitioner was cited constituted an "imminent threat to the administration of justice." *In re Little,* 404 U. S. 553, 555 (1972). Throughout the Brief in Opposition, there is reference to the petitioner as being "smart aleck" and "flippant" and "obstreperous," and his efforts to zealously defend his client are characterized as "antics." What the respondent is essentially arguing(as he did in the court below) is that conduct *perceived* by him as being "disrespectful" can be punished as criminal contempt, without regard to whether it created a material obstruction to the administration of justice. The respondent has indeed confused "offenses to his sensibilities with obstruction to the administration of justice," *Brown* v. *United States,* 356 U. S. 148, 153 (1958), and the Kentucky Court of Appeals has sanctioned this confusion. As the Louisville Bar Association has pointed out in its amicus brief, "Their entire opinion does not establish a specific instance of actual obstruction" (Brief of Amicus Curiae, p. 11). This Court has made it clear that a lawyer cannot be convicted of criminal contempt unless he "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). But it has not precisely defined what conduct on the part of an attorney can be made punishable as criminal contempt in the context of a particular case where multiple contempt charges have been levied and where the trial judge insists that conduct perceived by him as "dis-

respectful" can constitute criminal contempt. This opportunity is presented to the Court in the case at bar and clearly justifies the grant of certiorari.

CONCLUSION

This case presents to the Court a number of issues that go to the very heart of our system of Criminal Justice, which issues respondent has consistently attempted to obscure by painting the petitioner as one bent on creating some type of chaos in the Court room, when the truthful fact is that he is an able lawyer who fought, in this case, at great personal risk to himself, that his client might receive a fair trial in a case of the utmost seriousness imaginable. Additional to offering an opportunity to vindicate the principle of zealous advocacy, without which our Republic cannot stand, this case contains substantive issues as to due process and the right to trial by jury which are of the greatest importance to the entire legal profession in the United States.

Thus, for the reasons stated herein, and for the reasons set forth in the Petition for Certiorari, the Petition should be granted by this Court.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Petitioner